No. 15539.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FORREST SILVA TUCKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

On November 7, 1956 the appellant was indicted by the Grand Jury for the Southern District of California in one count for a violation of Section 751, Title 18, U. S. C. (Escape from Federal Custody). [Clk. Tr. p. 2.] The case was tried from January 22, 1957 to and including January 25, 1957, the defendant being represented by retained counsel. On the latter date, the jury returned a verdict of Guilty and defendant was sentenced to eighteen months in the custody of the Attorney General, to run consecutively to a twenty-five year sentence being served in the Northern District of California [Clk. Tr. p. 31] and concurrently to all other sentences. [Rep. Tr. pp. 377, 380, 388.]

The United States District Court had jurisdiction of this case under Section 3231 of Title 28, U. S. C.

Notice of Appeal was filed on January 29, 1957. [Clk. Tr. p. 35.] Thereafter, a Motion for an order granting leave to appeal in Forma Pauperis was granted [Clk. Tr. p. 41], the designation of record filed [Clk. Tr. p. 44] and the record on appeal docketed.

II.
The Statute Involved.

The indictment was brought under Section 751 of Title 18, United States Code, which provides in pertinent part as follows:

> "Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge or commissioner, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both. June 25, 1948, c. 645, 62 Stat. 734."

III.
Statement of the Facts.

In connection with the issues raised by appellant, the following facts were proved at the time of trial, in addition to those cited in the opening Brief.

The United States Marshal's Office for the Southern District of California operates within the United States Department of Justice *under the direction and supervision of the Attorney General.* The United States Marshal assumes custody of *all* federal prisoners committed to the custody of the Attorney General and arranges for their safekeeping and transportation to places of confinement. Alcatraz is a federal penitentiary where such prisoners are committed. However, when brought to Los Angeles, they are confined in the County Jail *under a contract with Los Angeles County.* [Rep. Tr. pp. 14, 15.] This contract provided that "Federal prisoners shall be provided with such medical and dental treatment as may be necessary to conserve their health."

Mr. Robert Ware, the U. S. Marshal for this District, corresponded with the Bureau of Prisons in connection with the execution of the above contract [Rep. Tr. p. 18] because of his duty in assuming custody of federal prisoners [Rep. Tr. pp. 14, 15] and recommended acceptance of the contract for that purpose. [Rep. Tr. p. 20.]

The contract was then executed by the Bureau of Prisons, also a part of the U. S. Department of Justice, with the written approval of U. S. Marshal Ware, and

also adopted by the Board of Supervisors for the County of Los Angeles. [Rep. Tr. pp. 10-12.]

Thereafter, the Sheriff's office which has the duty of supervising the operation of the Jail Division, cared for all federal prisoners pursuant to the authority of this document. [Rep. Tr. pp. 36, 37.]

The Los Angeles County Jail unit at the Los Angeles General Hospital is actually a *place of imprisonment.* [Rep. Tr. pp. 29, 30.] When a prisoner was transferred from the Los Angeles County Jail at the Hall of Justice to the General Hospital, the U. S. Marshal for this District did not require notification because there is such a "lock-up" at the Hospital. The contract has a provision for notification because in some counties there is no such facility at the county hospital. [Rep. Tr. p. 21.]

There is a jail hospital facility at the Los Angeles County Jail in the Hall of Justice [Rep. Tr. p. 44] for minor medical attention. [Rep. Tr. pp. 22, 47.] When a federal prisoner is taken to the General Hospital a substantially higher fee is charged to the Government. [Rep. Tr. pp. 26-28.] This latter fee is paid to the Hospital.

After the jail authorities received a letter from appellant while he was incarcerated in the Los Angeles County Jail at the Hall of Justice, he made several visits to the Jail Hospital there. [Rep. Tr. p. 46.] Finally, upon recommendation of the jail doctor, appellant was referred to the General Hospital for further study in regard to possible prostatitus or ureteral calculus. [Rep. Tr. pp. 48, 49.]

The L. A. County Jail Ward at the General Hospital covers a portion of the 13th floor thereof. It is separated from the rest of the hospital by bars and doors. [Rep. Tr. p. 83.]

Deputy Sheriff William Phillips had charge of "custodial and security" operations at the said jail ward as "Sergeant in charge." [Rep. Tr. pp. 62, 63.] Everyone present in the ward was under his supervision as far as custodial and safety requirements were concerned. [Rep. Tr. p. 65.]

There were three shifts of deputy sheriffs in the jail ward during any twenty-four hour period, two men being on each shift. Sergeant Phillips was the third man on the day shift. [Rep. Tr. p. 63.]

There was an average of 67 prisoners processed through the jail ward each day by the two deputy sheriffs. [Rep. Tr. p. 64.] The prisoners were admitted to and transported from the jail ward through a main gate which was always opened and closed by a deputy. [Rep. Tr. pp. 84, 108.] The normal routine in connection with a prisoner leaving the ward for a clinic was to place handcuffs or leg irons on him. The prisoner never walked to the gate, but was always wheeled or carried on a stretcher. [Rep. Tr. pp. 108, 109.]

The key to the handcuffs was always kept by the deputy. [Rep. Tr. p. 109.]

The jail unit at the Hospital has eighteen wards. There was no X-ray equipment. There are various clinics in the hospital staffed with specialists where prisoner patients *had to be taken* for treatment. [Rep. Tr. p. 65.]

These clinics and specialists are *located in other places* in the General Hospital. [Rep. Tr. pp. 65, 112, 117.]

The normal routine when a prisoner was transported to another facility of the General Hospital out of the jail ward was that he was turned over to an attendant other than the two deputy sheriffs or Sergeant Phillips. These attendants were assigned to the jail ward permanently and *worked under the supervision of Sgt. Phillips.* [Rep. Tr. pp. 67, 68.]

The appellant was received from two deputy sheriffs at the jail ward the day before the escape with no indication of his status or record other than "En route U. S. Marshal." [Rep. Tr. p. 73.] He subsequently told one of the deputys in the ward that he was being held as a "material witness." [Rep. Tr. p. 110.]

On the morning of the 4th of November, 1956, he was carried on a stretcher to the main gate at the jail ward by Attendant Knox. A deputy sheriff *placed handcuffs on his wrists* and *kept the key.* [Rep. Tr. pp. 108, 109.] It was not customary for a deputy to accompany prisoners to other facilities of the hospital, unless certain information was known to him. [Rep. Tr. pp. 114, 115.]

Attendant Knox had been assigned to the jail ward in the General Hospital for two years and the bulk of his duties consisted of transporting prisoner patients from the jail ward to and from the clinics in the hospital. He averaged from eight to ten such trips per day. [Rep. Tr. pp. 110, 117, 128.] He worked under the instruction of Sgt. Phillips or any of the deputies. [Rep. Tr. p. 118.]

On the morning of the 4th, he was directed to take appellant to the Cystoscopic Clinic. [Rep. Tr. p. 118.] This facility was equipped for examination in connection with certain bladder and kidney ailments. There is no such facility in the jail ward at the hospital. [Rep. Tr.

pp. 120, 121.] Attendant Knox then took the appellant to the main gate so the deputy could handcuff him. [Rep. Tr. pp. 118, 217.]

Deputy Scovel kept the key to the handcuffs which were placed on appellant's wrists, as stated above.

Attendant Knox transported the prisoner on the stretcher down to the fourth floor of the hospital and proceeded to the cystoscopic clinic. As he turned to open the double swinging doors, the events occurred which led to the prisoner's escape from the hospital. [Rep. Tr. pp. 122-128.]

The defendant was still in handcuffs when apprehended near Bakersfield later that day. [Rep. Tr. pp. 194, 195, 217.]

IV.
Argument.

The Government respectfully submits that there is no real issue here as to whether or not the Sheriff of Los Angeles County was an authorized representative of the Attorney General of the United States.

The only question in this case is whether appellant was still in the custody of an authorized representative of the Attorney General of the United States at the time of his escape from the custody of a hospital attendant.

The only reasonable conclusion from the evidence in this case is in the affirmative.

However, since counsel has raised the contention that even the L. A. County Sheriff was not authorized by the Attorney General to have custody of the appellant on the ground there is no evidence to prove the Assistant

Director of the Bureau of Prisons was authorized by the Attorney General to enter into contracts with local agencies pertaining to the care and custody of federal prisoners, we call the Court's attention to the fact that the "Motion for Dismissal" made after the Government's *prima facie* case, did not urge this objection. (We assume that the said motion was treated by the District Court as a Motion for Judgment of Acquittal under Rule 29 of the Federal Rules of Criminal Procedure.) It is apparent that the only basis for the motion was that the defendant had been taken out of the County Jail ward of the County Hospital and was in the custody of an orderly of the Hospital. In fact, a concession by counsel seems to be made at line 20 [Rep. Tr. p. 204] that the Sheriff had authority to handle prisoners for the U. S. Marshal and he goes on to say that it was not a delegable power.

The Government also calls this Court's attention to the fact the motion was not renewed in the case. [Rep. Tr. pp. 249, 344, 345.] In order to preserve any question of the sufficiency of the evidence on appeal the motion has to be renewed. Further, the question as to whether the appellant was in the custody of an authorized representative of the Attorney General in connection with the hospital orderly seems to have been submitted to the jury as a question of fact [Rep. Tr. pp. 355, 356] without objection from appellant [Rep. Tr. p. 367] and, therefore, cannot be raised at this time on appeal.

Assuming, arguendo, that this Court will consider the first question raised by the appellant, the evidence shows that he is in error. The Los Angeles County Sheriff was clearly an "authorized representative" of the Attorney General.

The U. S. Marshal has the duty of caring for all federal prisoners and works *under the supervision of the Attorney General.* The contract in question was executed at his instance and because of such responsibilities, as shown by the correspondence in evidence, the contract itself [Exs. 5, 6, 7 and 8], and his testimony as to his duties with respect to Federal Prisoners. He recommended its acceptance in writing and ever since that time officially acted in federal custody matters pursuant thereto.

Section 4002 of Title 18, United States Code, provides in effect that the Director of the Federal Bureau of Prisons may contract with the proper authorities of any political subdivision of any state for the "imprisonment, subsistence, care, and proper employment of all persons held under the authority of any enactment of Congress." This section is recited in the contract itself. Further, Section 4042(2) clearly shows that the Bureau of Prisons in so doing is acting under the direction of the Attorney General.

Thus, this particular document executed by the Bureau of Prisons, which is also a part of the Department of Justice, was authorized by statute. Sections 4002 and 4042(2) show the Bureau of Prisons is the actual contracting agency for all matters pertaining to the care and custody of federal prisoners on behalf of the Attorney General. It is equally clear that the representative designated in the contract to care for federal prisoners was in turn an "authorized representative" of the Attorney General since it was also executed with the written approval of and for the benefit of an official acting under the supervision and direction of the Attorney General. The Marshal placed the official stamp of approval from the Attorney General upon the local agency as his author-

ized representative by negotiating the execution of the contract and approving it in writing on the document itself. He then continued to act pursuant to its terms in connection with the custody and care of federal prisoners.

In connection with the merits of the only issue of any substance here, the Government submits that a liberal construction of the statute should be made. This section was obviously created to protect the public against especially dangerous elements of the population. Confinement in prison for long periods of time, together with the prospect of future incarceration, could well engender a determination to escape and stay at large at all costs. Under such conditions, slight provocation from innocent persons and helpless families could easily precipitate serious injury and even death. An unrealistic and strict construction of the Section could provide a means of avoiding the deterrent of the law by those who would cleverly and carefully calculate opportunities for escape outside a narrow construction of custodial status.

Judge Ernest Tolin stated at the trial of the case [Rep. Tr. p. 31]:

> "You had within the question the proposition if a man was not in the very prison ward he was not in the County Jail.
>
> Now, I don't think that is involved in the case. The question here is federal custody, custody of the Attorney General. Men are in the custody of the Attorney General at times within this courtroom, at times within the elevator, and we are inquiring into custody of the Attorney General, rather than quality of the institution in which the custody might be exercised."

The evidence shows that the Jail ward at the General Hospital is actually not much more than a "lock up." Clearly, prisoners could not be kept overnight in wards with other patients at the hospital. A portion of the thirteenth floor is set aside by bars and doors from the rest of the establishment for this purpose. The only reason the prisoners are there at all is because they need, or appear to require, special medical attention which cannot be supplied by the limited facilities at the downtown jail. Since the hospital is equipped with everything necessary for competent medical attention, the only extra facility needed would be on a custodial basis. Obviously, the jail ward was only such a base of operations from which the prisoners could be transported to the facility which suited a particular ailment.

The evidence shows a reasonable custodial routine has been established at the hospital to facilitate the handling of a large number of prisoner patients every day. Further, the fee paid by the Marshal in these cases is paid to the hospital itself and is substantially larger. It strongly indicates that services will be rendered *by the Hospital* in connection with the treatment and examination of prisoners. One of these extra costs is obviously that of attendants, nurses, clerks and others who must of necessity be assigned to the jail ward by the County Hospital. Can it be said the contract with the County did not contemplate the using of hospital orderlies and attendants to transport prisoner patients to necessary facilities under reasonable precautions. The Marshal knew the jail ward was just a "lock-up."

Technically, the contract is with the County of Los Angeles, not the L. A. County Sheriff, and provided for

the safekeeping, care and subsistence of prisoners. The County is a legal entity and could use, in accordance with the spirit of the contract, any county employee whose services would be reasonably necessary in connection with special medical care. Here attendant Knox was also a county employee, exclusively assigned to the jail ward for the purpose of transporting prisoners. Further, careful precautions were taken to safeguard the prisoner's custody. The fact that he succeeded in achieving his liberty for a short time does not change this fact.

There were only two deputy sheriffs available to process the patients and an average of 67 passed through each day. The normal routine was to receive the prisoner on a stretcher or in a wheelchair before he passed through the bars and to handcuff his wrists. It is important to note that the deputy kept the key to appellant's cuffs. Attendant Knox did not have a key.

Appellant was not turned loose on his own devices, with merely the expectation he would dutifully go to the cystoscopic clinic. It could be said appellant was in the joint custody of both the Deputy Sheriff and Attendant Knox. The Sheriff had not made any move to relinquish his custody and, in fact, took steps to safeguard it, as set forth above. The fact that he had to share this custody with a hospital attendant regularly assigned to the jail ward in shuttling prisoners back and forth to necessary medical facilities does not affect his custodial status.

Even so, the contract itself described the place of detainment as the Los Angeles County Jail, Los Angeles since the basic purpose of the agreement was confinement. However, necessarily flowing from such an arrangement

ere provisions for adequate subsistence and medical care. n fact many considerations were given to the confine- ient of prisoners, such as visits, mail, publicity, personal roperty, deaths, marriage, employment and others. Nor- ially, with a few exceptions, only the problem of medical are would involve a substantial undertaking with respect o removal of the prisoner's person from the jail in down- own Los Angeles. The contract recognizes the need for utside hospitalization and specifically names the "Los Angeles County General Hospital." It does not mention he jail ward in the hospital. It is thus clear that the ontract itself specifically provides for hospitalization in he general medical facilities of the hospital. As stated bove, the contract is with the County of Los Angeles, ot specifically the Sheriff, and the "Description of Serv- ce" is in part set forth as "Safekeeping, care and sub- istence of prisoners * * *." There is nothing in it vhich indicates that "safe custody" in the hospital meant he actual presence of a deputy sheriff at all times with a patient.

There is actually no provision which even demands hat there be a deputy sheriff or a "Jail Ward"' in the nstitution. The requirement is that the prisoners are n "safe custody" and "proper discipline and control" are maintained. Of course, it is good sense to expect that ail facilities would be provided from within the Hospital vith, at least, supervising deputy sheriffs in charge. Such vas the case here. However, the details of custodial arrangements in case of removal to the Hospital are clearly eft within the discretion of the County, as long as the above general requirements are fulfilled.

There are few reported cases to be found which deal vith the question of custody on an escape charge; how-

ever, the cases cited below all indicate a willingness on the part of the Courts to liberally construe the language of the various statutes and orders before them. In the early case of *Hicks v. Folks, Sheriff of San Diego County*, 97 Cal. 241, January 21, 1893, the Board of Supervisors for San Diego County passed an order providing for the working of prisoners under the direction of a responsible person. The Sheriff resisted a demand of a person appointed as overseer of such prisoners by the Board for the production of certain prisoners in his custody. The appellant contended that the Sheriff was the only legal and proper custodian of prisoners under the Political Code, insisting that the words of the order "under the direction of some responsible person" did not mean a change of custody. The Supreme Court of the State of California did not sustain the Sheriff's contention and stated in part:

> "* * * These statutes do not impose any additional duties upon the Sheriff. If it were intended that prisoners while at labor should be in the immediate custody of the Sheriff, it is reasonable to suppose the statute would have said so. The authority given the Board of Supervisors is broad enough to include the custody of the prisoners while absent from the jail, and indeed the custody by the 'responsible person' under whose direction they are required to labor is essential to their profitable employment. *It does not follow from the fact that they are such officers that the Sheriff or any of his deputies are suitable persons to direct such labor;* * * *
>
> The authority conferred upon the Board of Supervisors 'to provide for the working of prisoners' includes all that is required to prevent escapes, as well as the direction of their labor. Any other construc-

tion would, at the pleasure of the Sheriff, *defeat the operation of the statute,* since the statute neither requires the Sheriff to perform this duty, nor authorizes the Board of Supervisors to compel him to perform it. Their custody as well as direction while at work is confined to some 'responsible person' by contract, and not by arbitrary direction. *The Sheriff might be selected for such purpose,* but could not be required to perform the duty, except as the result of a contract voluntarily made by him."

With respect to the contract in question, Rule No. 1 lating to "responsibility for Prisoners' Custody" pro- des that "It is the responsibility of the Sheriff, Jailor, *other official responsible for the administration of the stitution* to keep the prisoners in safe custody and to aintain proper discipline and control." Under this pro- sion the County could select the Sheriff for such pur- pse either solely or jointly with other persons to exer- se custodial care over patient prisoners. The County uld also select an agency other than the Sheriff to exer- se this responsibility as long as the prisoners were in safe custody" and "proper discipline and control" were aintained under the terms of the contract.

The case of *People v. Hadley,* 88 Cal. App. 2d 734, 99 P. 2d 382 (Nov. 20, 1948), may be of interest this Court in connection with the question of the cus- dy itself. The prisoner was charged in essence with violation of the California Penal Code in that, while prisoner committed to the State Prison at Folsom r a term less than life, and while at work outside the rison under the surveillance of prison guards, he escaped. he evidence showed that the prisoner was at a camp charge of a correctional officer of Folsom Prison out-

side of the Prison itself. The defendant left the cam with the permission of the officer to go fishing. Ther was one other prison guard at the camp in addition t the above officer, but there was no guard with the pri soner on his fishing trip. At the trial defendant asserte that the surveillance had been only a technical one, thoug the guards were responsible for the prisoners, and tha there was no physical control of the men during the day time while working in the forest. The Court held a page 736:

> "It is true that the Camp had but two guard who obviously could not keep their eyes at all time on some fifty inmates; but it does not follow tha appellant's escape is not to be deemed within th statute because he was not so guarded. The languag of the section was broad, and, we think, quite suffi cient to comprehend the escape of appellant from th forestry camp where he was working. See *Peopl v. Howard,* 120 Cal. App. 45, 51-52 (8 P. 2d 176) *People v. Upton,* 67 Cal. App. 445 (228 P. 50)(*People v. Lewis,* 61 Cal. App. 280 (214 P. 1005). *People v. Crider,* 76 Cal. App. 1001, 1004 (24 P. 113)."

See also:

> *People v. Howard,* 120 Cal. App. 45, 8 P. 2d 17 (1932).

In *People v. Priegel,* 272 P. 2d 831 (Dist. Ct. of App 4th Dist., Cal., July 15, 1954), an Order was made b the Superior Court of San Diego that the prisoner b taken from the County Jail to the San Diego Count Hospital for treatment and be "kept" there and upo his recovery "be returned to the custody of the Sheri of San Diego County." The defendant argued that th

rovision in the Order that he be kept "without guard" ontrolled over the word "kept" and that he was not in ustody during his period at the hospital. He contended nat the words "returned to the custody" of the Sheriff nade it conclusively appear that the Court had released im upon his own recognizance. The Court stated at age 832:

> "The entire Order made by the Court must be considered as a whole, and not merely one phrase therein, in order to determine its meaning and effect. * * * Instead of indicating an intention to release the defendant from custody for a time, the Order clearly discloses an intention to maintain continuous custody, the only change being with respect to the place of custody. * * *
>
> The use of the phrase 'without guard' relieved the Sheriff of the duty of furnishing a deputy to guard the defendant during the period of treatment but in no way affected the duty placed on the hospital authorities to keep him there during that period, and until he was returned to the custody of the Sheriff. The only way they could carry out the Court's Order was to lock the defendant up, and the evidence is that the only facilities they had for keeping a patient locked up was by placing him in the psychopathic ward. This was done, * * *."

In the case of *Giles v. United States,* 157 F. 2d 588 (9th Cir., Oct. 14, 1946), this Honorable Court rejected a contention from the appellant that he could not have been deemed to have attempted to escape from custody because he was not at all times under the observation of one or the other of the prison guards. He had been working on a dock with other inmates of Alcatraz under

the general supervision of prison guards. Judge Heal stated at page 589:

> "The argument is without force. *The statutor term 'custody,'* as applied, certainly, to the situatio of appellant, *is not so narrow and restricted.* Appel lant likens the case to one where the custodian o a prisoner purposely abandons his charge, leaving hir free to go his own way. There was no abandonmen of custody in this instance. Moreover, *the questio of custody was submitted to the jury as one of fac* in an instruction stating that, in order to convict the evidence must show beyond a reasonable doub that the accused was actually in custody at the begin ning of the alleged attempt to escape."

It is clear that the language above quoted, considering the circumstances present in that case, would be controlling in the instant matter. Further, the question of custody was also submitted here to the jury as one of fact [Rep. Tr. pp. 352-356, 366, 367.]

It is respectfully submitted with respect to the *Giles* case that none of the matters raised by Judge Denman in his defense would be appropriate in this matter.

Conclusion.

It is respectfully submitted to this Honorable Court that, for the reasons stated above, the Judgment below should be affirmed.

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